No. 48779-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JAMES V. KAVE AND HOLLY M. KAVE,
individually and the marital community thereof,
Appellants
v.
McINTOSH RIDGE PRIMARY ROAD ASSOCIATION,
a Washington State Corporation,
Respondent

APPELLANTS' REPLY BRIEF

Kelly DeLaat-Maher, WSBA #26201
SMITH ALLING, P.S.
Attorneys for Appellants
1501 Dock Street
Tacoma, Washington 98402
(253) 627-1091

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COMES NOW Appellants, James V. Kave and Holly M. Kave (together the "Kaves"), by and through their attorney, Kelly DeLaat-Maher of Smith Alling P.S., and submits Appellant's Reply Brief to Respondent's brief on appeal as follows:

I. RESTATEMENT/CLARIFICATION OF FACTS

The Kaves substantially rely upon the Statement of Fact contained within its Appellant's Brief. Notwithstanding, some clarification is necessary following Respondent's Brief on Appeal.

For example, the Association asserts that the Kaves were aware of the existence of the two easements burdening their property at the time of purchase. The Kaves do not dispute the existence of the easements. However, it is also evident from the testimony and evidence presented to the court prior to trial and during trial testimony that most, if not all of the purported amenities were located outside of the easement. Mr. Kave testified that he reasonably believed that items located outside of the easements, and in particular the picnic shelter, did not belong to the Association. VRP 342-343. Mr. Kave also testified that the purported amenities were not appropriately maintained by the Association. VRP 319.

The Association appears to make light of the damage it caused to the wetland, which damage was the catalyst to the suit. The damages to

the wetland were adequately documented in the suit by various Declarations filed with the court. CP 98-148; 155-159; 293-309; 310-368; 456-465. The Association claims the Kaves went to great lengths to have the area in question qualified as a wetland. However, it is also evident that based upon the Kaves actions, the regulatory agencies involved agreed that it was a wetland which required restoration. The Association was responsible to conduct restoration, which was not completed until over a year after the action commenced. Although the Association's restoration removed the need for injunctive relief, it also caused the Kaves a great deal of damage in having to seek out those experts and consultants to confirm the damage to the property, and set a plan for restoration.

II. ARGUMENT

A. THE KAVES IDENTIFIED THE PROPER STANDARD OF REVIEW

(i) Trail Easement Summary Judgment

On review of an order for summary judgment, the court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). As specifically stated in *Kruse v. Hemp*, in reviewing a summary judgment order, an appellate court

evaluates the matter de novo, performing the same inquiry as the trial court. *Kruse*, at 722.

In its reply brief, the Association argues that instead of using the de novo standard of review with respect to the trial court's ruling granting summary judgment and quieting title to the Association, the Court can review a decision made on summary judgment for an equitable remedy under an abuse of discretion standard. See Brief of Respondent, p. 16 (citing to *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership,* 158 Wn.App. 203, 242 P.3d 1 (2010). However, the *Cornish* case did not deal with an easement – instead it addressed the court's grant of specific performance on summary judgment. In a footnote, the court stated:

> In reviewing a recent case decided on summary judgment, our Supreme Court stated that "a decree of specific performance rests within the sound discretion of the trial court," *Crafts v. Pitts*, 161 Wash.2d 16, 29, 162 P.3d 382 (2007), and reviewed the trial court's decision to grant specific performance for an abuse of that discretion. *Crafts*, 161 Wash.2d at 30, 162 P.3d 382. The court did not explain how this approach was consistent with its earlier pronouncement in *Folsom* that the "de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." 135 Wash.2d at 663, 958 P.2d 301. Because the *Crafts* decision is more recent than *Folsom* and, unlike *Folsom*, deals with a dispute precisely of the type presented here, we follow the court's method of analysis set forth in *Crafts*.

Id. at Footnote 10. The *Cornish* decision does not stand for the court to abandon long standing case law requiring that a decision on summary judgment be reviewed de novo, as it is particular to a case dealing with specific performance. Instead, the court should continue with application of de novo review, as supported by *Ruvalcaba v. Kwang Ho Baek*, 175 Wn. 2d 1 (2012). In that case, the Supreme Court applied the de novo standard of review to a decision on summary judgment dealing with a condemnation action for private way of necessity. The equitable relief in that case is more akin to an action for an implied easement than specific performance.

(ii) Decision Denying the Kaves' Motion to Dismiss the Association's Counterclaims under RCW 4.24.630

The parties agree with the appropriate standard of review as de novo.

(iii) Motion in Limine

The parties agree with respect to the appropriate standard of review for decisions on a motion in limine as an abuse of discretion.

(iv) Statute of Limitations Instruction and Motion to Dismiss

In their brief, the Association claims that an appellate court need not consider an alleged error if the party claiming error did not propose an instruction. See Response Brief p. 18. Here, the Kaves counsel requested

an instruction continuously, and discussed the needed language with the court. Thus, this Court can review the court's error in failing to give an appropriate instruction. The parties agree that the proper standard of review is whether the trial court abused its discretion by giving or refusing to give certain instructions. *Goodman v. Boeing Co.,* 75 Wn.App. 60, 68, 877 P.2d 703 (1994).

The parties agree with that the appropriate standard for a motion to dismiss is de novo. A trial court's denial of a motion for judgment as a matter of law is reviewed using the same standard as the trial court. *Mega v. Whitworth College*, 138 Wn.App. 661, 668, 158 P.3d 1211 (2007).

(v) Jury Instructions

This Court should review a challenge to a jury instruction de novo if it is based upon a matter of law, and for abuse of discretion if based upon a matter of fact. *Kappelman v. Lutz*, 167 Wash.2d 1, 6, 217 P.3d 286 (2009). Jury instructions are sufficient if they allow each party to argue its case, are not misleading, and properly inform the jury of the applicable law when read as a whole. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 117, 323 P.3d 1036 (2014). An erroneous jury instruction is reversible error if the error was prejudicial. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). The party challenging the jury instruction bears the burden to demonstrate prejudice.

Fergen v. Sestero, 182 Wash.2d 794, 803, 346 P.3d 708 (2015). We presume prejudice, however, if a jury instruction clearly misstates the law. *Keller v. City of Spokane*, 146 Wash.2d 237, 249–50, 44 P.3d 845 (2002).

Here, the jury instructions misstated the law with respect to nuisance. Further, the instructions misstated the law with respect to the application of RCW 4.24.630, as the jury was never informed that "interference" with an easement is not the same as going onto the land of another, as required by the statute. Review of those instructions is thus de novo.

(vi) Standard of Review for Award of Attorney's Fees

The parties agree as to the standard of review as abuse of discretion.

B. THE COURT'S DECISION AS TO THE TRAIL EASEMENT

The Kaves do not dispute that their property is burdened by a trail easement, which was created upon the recordation of the Second Amendment to the EC&Rs, Thurston County Auditor's No. 3484160. The legal description for the trail is specific, and is described as "[a] 10 foot wide easement...lying 5 feet on each side of the centerline of the trail as built and located on the ground. . ." . CP 1299. Exhibit B to the Second Amendment contains a map depicting the Trail Easement as 50' feet wide. CP 1300. However, Exhibit B contains additional language that provides

that "[t]he purpose of this drawing is to show the general location of the easement as a schematic representation." *Id.* The map should be considered nothing more than a schematic, as it does not contain a legal description, and is further inconsistent with the legal description provided in the Second Amendment to the EC&Rs.

It is undisputed that the trail location has moved from its original location. How far it has moved from its original location is a matter of dispute. Also in dispute is the reason it was moved. CP 1555.

The court expressly denied the Association's request to quiet title to the trail under a theory of implied easement. Instead, the court quieted title to the trail in its location existing as of the date of the hearing, apparently exercising its equitable powers. The Association characterizes the court's action of simply confirming the existence of the trail within a 50 foot corridor, and that the location did not need to be altered or moved. Response Brief p. 21. However, when viewed in conjunction with the court's oral ruling, as well as the language of the Order requiring the Association to take steps to document the current location of the trail to the extent it shifted from its legally described path, the court effectively altered the original location of the trail as legally described. CP 1916.

In their response, the Association argues that *Piotrowski v. Parks*, 39 Wn.App 37, 691 P.2d 591 (1984) stands in support of their argument

that the superior court has the powers to determine the location of an easement. *Piotrowski* is factually and legally distinguishable from the case at hand. In that case, the essential issue was whether the parties' mutual predecessor in interest, Sawyer, had executed an oral agreement with contract purchaser, Parks, to establish the boundary between the two properties, one of which was eventually transferred to Piotrowski. *Id.* at 38. In determining that a fence line had become the boundary pursuant to an oral agreement, the court held as follows:

> We hold, therefore, that an oral agreement between owners of adjoining tracts of land (1) permanently fixing a common boundary that (2) had been uncertain, becomes binding and enforceable upon the parties and their successors in interest after (3) they have in some fashion designated that boundary on the ground by erection of a structure capable of evoking inquiry as to its significance, and after (4) they have taken possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest. The boundary agreed upon by Parks and Sawyer in 1973 meets all those criteria.

Id. at 46. Not only are the facts significantly different than the case at bar, the case does not provide that an easement can be relocated or its location modified by exercise of the equitable powers of the court, as argued by the Association.

The Association next points to *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 999 P.2d 54 (2000) in support of their contention that it is

proper to reform the legal description of the easement to the extent it is deficient. Therein, the court stated that "a trial court has equitable power to reform an instrument if there is clear, cogent and convincing evidence of a mutual mistake or a unilateral mistake coupled with inequitable conduct." *Id.* at 843. The case also provides that reformation may also be justified on the basis of a scrivener's error. *Id.* at 843-844. Here, there is no evidence presented that the location of the easement was modified based upon a mutual or unilateral mistake, or that the legal description contains a scrivener's error. Reliance on *Wilhelm* is misplaced.

Instead, the Court should follow the decisions outlined in *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn.App. 188, 199, 45 P.3d 570 (2002); *Crisp v. VanLaeken*, 130 Wn.App. 320, 122 P.3d 926 (2005); and *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 854, 351 P.2d 520 (1960) ("We agree with the defendants that the consent of all interested parties is prerequisite to the relocation of an easement."). Here, the court relocated the easement, requesting the Association to document its new location to the extent it had moved from its express location. CP 1916. The Kaves did not consent to relocation of the easement or its shift over time, as required by *Coast Storage Co., supra.* It is not relevant that the Kaves are the servient estate holder, as the case law provides that consent of all parties is a prerequisite to relocation. *Id.*

C. THE COURT'S DECISION ON SUMMARY JUDGMENT AS TO THE ASSOCIATION'S RCW 4.24.630 CLAIMS

Plaintiffs' Motion for Summary Judgment heard on October 2 requested that Defendants' counterclaims under RCW 4.24.630 be dismissed, which the court denied in its oral ruling and in the Order entered November 6. CP 1915-1918.

In *Washburn v. City of Federal* Way, 169 Wn.App. 588, 610, 283 P.3d 567 (2012), the appellate court noted that a trial generally bars review of a denial of a summary judgment motion because the trial resolves material issues of fact. *Id.* at 610, (citing *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn.App. 791, 65 P.3d 16 (2003)). A limited exception to this rule exists, however, where summary judgment turns solely on an issue of substantive law rather than factual matters. *Univ. Village Ltd. Partners v. King County*, 106 Wn.App. 321, 324, 23 P.3d 1090 (2001). In that case, the appellate court may review the ruling despite subsequent entry of a final judgment if the issue is solely one of substantive law. *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn.App. 66, 79. 248 P.3d 1067 (2011).

The Association argues that the Kaves trial counsel conceded there were issues of fact, and thus the Order denying summary judgment is not subject to appeal. The Association's characterization is erroneous, as

review of the hearing transcript reveals that the statement made by the judge was "I think even counsel for Plaintiff concedes there are issues of fact on most, if not all issues." CP 2113. This was not a concession made by counsel. The Kaves counsel did not, in fact concede that summary judgment should be denied with respect to RCW 4.24.630 on the Association's counterclaims, but rather that issues of fact existed that precluded summary judgment on that issue against the Kaves. CP 1696-1700.

Whether RCW 4.24.630(1) is an appropriate counterclaim for the Association is a matter of substantive law rather than fact, and thus subject to this court's review. There is no factual dispute that all activity took place on the Kaves' own land, over which the Association had an easement.

RCW 4.24.630(1) provides in pertinent part as follows:

> **Every person who goes onto the land of another** and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. . . .

(emphasis added). In *Clipse v. Michels Pipeline Const.*, Inc., 154 Wn. App. 573, 577-78, 225 P.3d 492, 494 (2010), the court outlined the types of conduct for which liability under the statute is imposed. "The statute establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) wrongfully causing waste or injury to the land, and (3) wrongfully injuring personal property or real estate improvements on the land. *Id. at 577-578* "By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. **Presence on the land is required for all three.**" *Id.* at 578 (emphasis added).

In their response, the Association points out that the Kaves ignore that their claims also concern alleged damage to the improved trail, as well as damage to the Community Recreation Area Easement. Whether the Kaves alleged wrongful actions took place on the Community Recreation Area Easement or the Trail Easement is irrelevant to the analysis of whether the Kaves are liable under RCW 4.24.630, as application of the statute is quite narrow. In order for the statute to apply, the alleged wrongdoer must go onto the land of another, as required in the very first sentence of the statute.

The Association relies upon *Colwell v. Etzell*, 119 Wn.App. 432, 81 P.3d 895 (2003) in its response. In *Colwell,* the court was very clear in

stating that RCW 4.24.630(1)'s premise is that the "defendant physically trespasses on the plaintiff's land." *Id.* at 439. The court goes on to point out that in that case, there was no physical trespass, as Mr. Colwell's actions in alleged interference with Etzell's easement rights were all taken on his own land. *Id.* The Association attempts to diminish this very clear statement requiring physical trespass by focusing on the court's analysis as to the servient owner's activities not being inconsistent with the future use of the easement. This analysis as to Mr. Colwell's conduct does not remove the requirement of physical trespass.[1]

In an effort to bolster their position, the Association focuses on non-precedential out of state opinions that find that a servient estate holder may have committed trespass by altering an easement. Washington courts do not recognize alleged interference of an easement by the servient holder as a trespass. It is not necessary for this Court to review the authority or opinions of other states. The statute is unambiguous, and requires that the alleged tortfeasor go onto the land of another. An easement provides the right to use real property of another without owning

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[1] This reading of *Colwell* is consistent with an unpublished case, *Camus v. Culpepper*, 157 Wn.App. 1046 (2010). In interpreting *Colwell*, the *Camus* court stated "[i]n fact, only physical invasion on the property itself is protected. Camus, as an easement holder, only owns a right to use the land, not the land itself. Only physical invasion on the property, not a right in the land, is protected under RCW 4.24.630.

it. *Kiely v. Graves*, 173 Wn.2d 926, 936, 271 P.3d 226 (2012). An easement holder only owns a right to use the land, not the land itself. *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). "An easement is a right, distinct from ownership, to use in some way the land of another, without compensation..." *Id.* RCW 4.24.630(1) requires physical invasion of the land, not interference with the right to use the land, in order for damages under that section to apply. The court should have granted summary judgment to the Kaves on that issue.

D. THE KAVES' CLAIMS UNDER RCW 4.24.630 FOR FEES INCURRED IN OBTAINING RESTORATION OF THE WETLAND ON PLAINTIFFS' PROPERTY

Pursuant to an Order on Motions in Limine on January 22, 2016 and confirmed at the start of trial by Order dated January 25, 2016, the court determined that the Kaves could not present claims for damages relating to the cost of restoring their property from the Association's wetland incursion, and specifically could not present evidence with respect to its consultant's fees under RCW 4.24.630.

The trial court previously dismissed some of the Kaves' claims under RCW 64.12.030 and RCW 4.24.630 on summary judgment in April 2014 on the basis of the statute of limitations. CP 587-590. In February 2015, the trial court dismissed claims for timber trespass under RCW 64.12.030, but specifically left the Kaves' claims under RCW 4.24.630 for

waste. CP 1255-1261. Following the Association's third motion for summary judgment, Judge Price allowed the Kaves' claims for $522.00 in timber damage under RCW 4.24.630 to remain, but further specifically provided that "[i]ssues of potential liability for consulting and attorney's fees remain." CP 1911-1914. It is apparent, based upon this ruling that the court was allowing the Kaves' claims with respect to the significant costs they incurred to obtain restoration of the wetland damaged by the Association to go forward for trial, contrary to the Association's statements in their brief. This is so even though the Kaves' claims for injunctive relief to force the Association to restore the wetland were moot.

For purposes of trial, a different judge than had handled all previous pre-trial matters was assigned. Upon the Association's Motion in Limine, the court determined that the Kaves could not assert the limited damages for timber removal under RCW 4.24.630, pursuant to *Gunn v. Riely*, 185 Wn.App. 517, 524, 344 P.3d 1225 (2015). CP 2248-2254. The court then requested additional briefing on why the wetland costs could be available when the wetland claims had been dismissed for mootness. CP 2248. Following the submission of additional briefing, Judge Hirsch dismissed the Kaves' claims for costs incurred in obtaining restoration of the wetland. CP 2290-2291. This dispositive order stands in stark contrast

to the previous orders on summary judgment issued by Judge Price preserving the Kaves' ability to proceed with claims on those costs.

The Association faults the Kaves for not addressing the applicability of *Gunn v. Riely*, 185 Wn.App. 517, 524, 344 P.3d 1225 (2015) in their Opening Brief. *Gunn v. Riely* stands for the proposition that RCW 64.12.030 governs direct trespass against a plaintiff's timber, trees or shrubs. *Id.* at 527. A party cannot recover damages for timber trespass under RCW 4.24.630 because RCW 64.12.030 applies. However, neither *Gunn v. Riely* nor RCW 64.12.030 is applicable when a party damages a wetland on another's property, requiring restoration. RCW 4.24.630 is the proper statute for damage and waste to real property. The statute calculates damages for claims brought under it as follows:

> Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

Case law interpreting the statute does not preclude recovery of consultant fees paid here representing the costs expended by the Kaves in restoring the wetland within the Community Recreation Easement.

E. THE STATUTE OF LIMITATIONS

The Association does not dispute that its claims for conversion and damages under RCW 4.24.630 are subject to a three-year statute of limitations. Instead, they argue that inclusion of an instruction on that point might have led to jury confusion, in light of application of a six year statute of limitations on other claims. See Brief of Respondent p. 38-39. They also argue that the Appellate Court should not consider the alleged error since the Kaves did not propose their own instruction.

To the contrary, during prolonged discussions between the court and counsel, the record reveals that trial counsel specifically requested an instruction from the court addressing the statute of limitations several times. VRP 423-424; 431; 506; 510; 529. Ultimately, the court declined to include an instruction because the Plaintiffs had not complied with the court's pre-trial order to provide a written proposed instruction. VRP 529-530. However, the exception made by the Kaves to the lack of instruction on this issue of the statute of limitations was adequately preserved for appeal.

CR 51(f) requires a party objecting to a jury instruction to "state distinctly the matter to which he objects and the grounds of his objection." This objection allows the trial court to remedy error before instructing the jury, avoiding the need for a retrial. *Egede–Nissen v. Crystal Mt., Inc.*, 93

Wash.2d 127, 134, 606 P.2d 1214 (1980). "The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Crossen v. Skagit County*, 100 Wash.2d 355, 358, 669 P.2d 1244 (1983). Based upon the record, it is clear that the trial court was sufficiently apprised of the objection.

In this case, Defendants asserted claims for conversion and damages under RCW 4.24.630 for Association "amenities" originally placed by the developer, Weyerheuser. These amenities included a picnic shelter, log benches, hitching posts, picnic tables, a log perimeter, a fire pit, a recreation/utility shed a and a flag pole. CP 259; 2143-2144.

Based upon the briefing and the testimony of Sarah Schroeder at trial, the only amenity within the three-year statute of limitations before Defendants filed its counterclaims was the picnic shelter. The court erred in failing to instruct the jury as to the appropriate statute of limitations, and further erred in refusing to grant the Kaves' Motion to Dismiss for alleged conversion or waste to any item but the picnic shelter.

F. JURY INSTRUCTIONS ON NUISUANCE AND RCW 4.24.630.

The Association argues that the Kaves failed to preserve any objections to Jury Instruction No. 10 as to nuisance, or Jury Instruction Nos 6, 7 and 8 outlining the elements of the Association's claim under

RCW 4.24.630. Citing to *Hudson v. United Parcel Service, Inc.*, 163 Wn.App. 254, 269, 258 P.3d 87 (2011), the Association argues that a failure to object to a jury instruction waives the issue on appeal.

Notwithstanding the above, if an instruction contains an erroneous statement of the applicable law that prejudices a party, it is a reversible error. *Thompson v. King Feed & Nutrition*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. *Id.* Even if an instruction is misleading, it will not be reversed unless prejudice is shown. Error is prejudicial if it affects or presumptively affects the outcome of trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). A clear misstatement of the law is presumed to be prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

Here, an instruction as to nuisance under RCW 7.48.120, as well as the application of RCW 4.24.630 is misleading. Thus, under the law announced *Keller*, supra, it is prejudicial. Both instructions are a clear misstatement of the law.

G. AWARD OF ATTORNEY'S FEES

(i) Treble damages and fees under RCW 4.24.630(1) are not warranted

The Association does not specifically address the Kaves' argument that treble damages and fees under RCW 4.24.630 is in error, other than simply referring to their previous response under Section IV.C of their brief. See p. 44 of Respondent's Brief. Notwithstanding, it must be restated that the Association is not entitled to any fees, nor are they entitled to any damages under that section. The court abused its discretion in granting an award of fees under RCW 4.24.630(1) in favor of the Association.

(ii) Fees Are Not Warranted under the EC&Rs to the Association on its Counterclaims.

The Association argues that the Kaves may not object to an award of fees under the EC&Rs, because they did not raise the exact argument before the trial court, and that they acknowledged that fees were available under the EC&Rs. The Association's argument is misplaced.

The Association argues that the Kaves are prevented from arguing that the attorney's fees provision contained within the EC&Rs does not apply to the Association's counterclaims under a theory of judicial estoppel. Judicial estoppel applies if a litigant's prior inconsistent position benefited the litigant or was accepted by the court. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App. 222, 230, 108 P.3d 147 (2005). In that case, Cunningham failed to list his personal injury claim

against Reliable in his bankruptcy petition. *Id.* at 225-226. The trustee determined that there was no property available for distribution, and granted a discharge. *Id.* at 226. Eleven days later, Cunningham filed a personal injury action against Reliable. *Id.* The court determined that the failure to list the claim in the bankruptcy schedules fulfills the criterion of judicial estoppel, since the Bankruptcy Code and court rules imposes on bankruptcy debtors an express, affirmative duties to disclose all assets, including contingent and unliquidated claims. *Id.* at 229-230. *Cunningham* is legally and factually distinguishable.

First, the Kaves did object to the award of fees under the EC&Rs, albeit for different grounds. Specifically, Kave argued that the Association did not follow the proper steps in order to be able to pursue a claim for nuisance under the EC&Rs, and thus should not be able to claim an award of fees under them. CP 2722. The Kaves also argued that they were in fact the prevailing party with respect to restoration of the wetland, since their action forced the Association to take steps in order to properly restore it. CP 2721. Further, counsel's acknowledgment before the trial court that the EC&Rs provide for fees is not in error. VRP 8.9-11:7. The EC&Rs do in fact provide for an award of fees to a prevailing party, but only under the circumstances outlined therein.

Section 8.10, upon which the Association relies, provides as follows:

> 8.10 **Enforcement.** If the Board of Directors of the Association, or their successors or assigns shall violate or attempt to violate any of the easements, covenants or restrictions herein, it shall be lawful for any other person or persons owning a Lot to prosecute any proceedings at law or in equity against the Association to prevent it from doing so or to recover damages and costs for such violation, including, without limitation, reasonable attorney's fees.

That section, by its very terms, only awards fees in the event an owner of a lot prosecutes proceedings at law or in equity to prevent the Association from violating or attempting to violate the easements, covenants, or restrictions. It does not provide for fees in the event the Association chooses to prosecute claims against an owner for alleged violations of the EC&Rs.

Attorney fees will not be awarded as part of the cost of litigation in absence of a contract, statute, or a recognized ground in equity. *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wash. App. 517, 524, 280 P.3d 1133, 1137 (2012). Here, the EC&Rs allow for an award of fees, but the fee provision must be strictly construed. See *Saunders v. Meyers*, 175 Wn.App. 427, 306 P.3d 978 (2013). By its terms, it does not provide for fees to the Association to prosecute its claims.

(iii) The Fee Award Should Have Been Reduced for Unproductive Claims

The Association argues that the trial court was not required to deduct fees for aspects of the case that did not support an award of damages. They cite to *Brand v. Dep't of Labor & Indus.*, 91 Wn.App. 280, 292, 959 P.2d 133 (1998) in support of their position, which was accepted for review by the supreme court in *Brand v. Dept. of Labor and Indus.*, 139 Wn.2d 656, 989 P.2d 1111 (1999). That case is specific to a claim under the Industrial Insurance Act, which is "remedial in nature and is to be liberally applied to achieve its purpose of providing compensation to all covered persons injured in their employment." *Id.* at 668. In reviewing the award of fees in that case, the supreme court stated that in considering the calculation of fees, the court should attempt to give effect to the underlying purposes of the Industrial Insurance Act. *Id.* at 668-669. The court went on to state that reducing attorney's fees awards to account for a workers limited success is inappropriate under the context of the Act. Id. at 670. *Brand* is inapposite to the situation at hand, since this is not a case arising under the Industrial Insurance Act. .

Significant case law, as cited by the Kaves in their Opening Brief, supports the assertion that the Court must take care to segregate fees from compensable hours from non-compensable hours. See *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 54 P.3d 665(2002); and *King Co. v.*

Squire Inc. Co., 59 Wn.App. 888, 801 P.2d 1022 (1990). Here, the Association was not successful in prosecution of all its counterclaims. The Association is not entitled to fees encompassing its unsuccessful counterclaims. Assuming that fees are warranted, this Court should remand the case to the trial court for an appropriate calculation of fees and costs.

H. CUMULATIVE ERRORS

The Association does not address in their response the Kaves' assertion that cumulative errors in this case justify remand for a new trial, other than a simple statement that the trial court did not err. Respondent's Brief p. 48. The doctrine of cumulative error recognizes that multiple errors might combine to deny a litigant a fair trial, even where such individual error does not prejudice the litigant in isolation. *Storey v. Storey*, 21 Wn.App. 370, 374, 585 P.2d 183 (1978). The errors in this case, particularly with respect to the consistent and erroneous application of RCW 4.24.630 constitute a cumulative error.

The Kaves were further harmed when they were prevented from testifying as to their own damages arising from the Association's actions in damaging wetlands on property owned by the Kaves, and over which the Association has a Community Recreation Easement. The Kaves should have been allowed to present testimony as to those restoration costs

and consultant fees, as the Association's actions were the catalyst to the suit. Just because the Association restored the wetland, only after the suit had been commenced, does not and should not have deprived the Kaves from maintaining their action. These errors undermine the Kaves' claims and defenses, and denied them the right to a fair trial.

I. FEES ON APPEAL

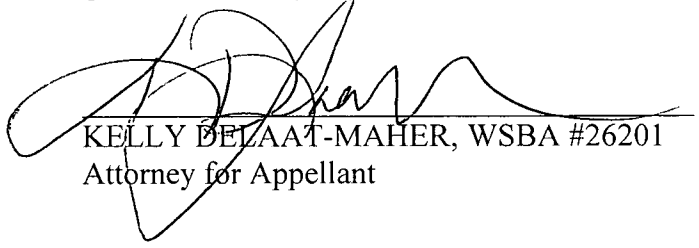
The Association as counterclaimant was awarded fees under RCW 4.24.630(1). In the event the case is remanded and reversed, pursuant to RAP 18.1 the Kaves request attorney's fees on appeal. The Kaves may also be entitled to fees pursuant to Section 8.10 of the EC&Rs, as it relates to prosecution of the Association for its actions in invasion of the wetland located on the Kaves' property.

III. CONCLUSION

As outlined in the Kaves' Opening Brief, this Court should reverse the orders challenged and vacate the judgment entered in favor of the Association. The Kaves request a new trial as indicated herein. Additionally, the Kaves request an award of attorney's fees and costs on appeal.

RESPECTFULLY SUBMITTED this 2nd day of November, 2016.

SMITH ALLING P.S.



KELLY DELAAT-MAHER, WSBA #26201
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of November, 2016, served a true and correct copy of the foregoing document, upon counsel of record via the methods noted below, properly addressed as follows:

Attorneys for Defendant Mark Wheeler WSBA#18352 John Kesler, III WSBA#39380 Bean Gentry Wheeler & Peternell 910 Lakeridge Way SW Olympia, WA 98502 (360) 357-2852 *mwheeler@bgwp.net* *jkesler@bgwp.net*	■ US Mail, Postage Prepaid ☐ US Mail, Certified ☐ Hand Delivery ☐ Overnight Mail ■ Email
Attorneys for Defendant Gabriella Wagner WSBA#42898 Wilson Smith Cochran Dickerson 901 Fifth Ave Suite 1700 Seattle, WA 98164 (206) 623-4100 *wagner@wscd.com*	■ US Mail, Postage Prepaid ☐ US Mail, Certified ☐ Hand Delivery ☐ Overnight Mail ■ Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of November, 2016, at Tacoma, Washington.

Amy H. Presley